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11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF NEVADA**

13 FRANCES M. WEEKS-ANDEREGG,)
14 Plaintiff,) 2:13-CV-00610-GMN-(VCF)
15 v.)
16 UNITED STATES OF AMERICA; CIVIL AIR)
PATROL FOUNDATION, INC., an Alabama)
Domestic Non-Profit Corporation d/b/a CIVIL)
AIR PATROL, INC.; DOES I-XV, inclusive;)
and ROE BUSINESS ENTITIES I-XV,)
inclusive,)
17 Defendants.) **UNITED STATES OF AMERICA'S**
18 **UNOPPOSED MOTION TO DISMISS THIS**
CASE WITHOUT PREJUDICE BECAUSE
KATHRYNE ALEXINE MCPHERSON WAS
ACTING WITHIN THE SCOPE OF HER
EMPLOYMENT
19 **AND ORDER**
20

21 **UNITED STATES OF AMERICA'S UNOPPOSED MOTION TO DISMISS THIS CASE**
WITHOUT PREJUDICE BECAUSE KATHRYNE ALEXINE MCPHERSON WAS ACTING
WITHIN THE SCOPE OF HER EMPLOYEMENT

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23 The United States of America ("United States"), by and through Daniel G. Bogden, United States
24 Attorney for the District of Nevada, and Daniel D. Hollingsworth, Assistant United States Attorney, and
25 Frances M. Weeks-Anderegg ("Weeks"), by and through John L. Bertoldo and Robert S. Cardenas,
26 Benson, Bertoldo, Baker & Carter, agree to dismiss this case and submit this unopposed motion to

1 dismiss this case without prejudice because (1) the parties agree to the dismissal, (2) McPherson was on
2 an air force assigned mission and is deemed to be under the Westfall Act of the Federal Tort Claims pursuant
3 to 10 U.S.C. § 9442(b)(2) (“The Civil Air Patrol shall be deemed to be an instrumentality of the United States
4 with respect to any act or omission of the Civil Air Patrol, including any member of the Civil Air Patrol, in
5 carrying out a mission assigned by the Secretary of the Air Force.”), (3) McPherson was acting within the
6 scope of employment, (4) McPherson’s actions were within the Nevada State exceptions to the going and
7 coming rule, and (5) Week failed to file an administrative claim.

8 This case should be dismissed without prejudice so that Weeks may pursue whatever rights she
9 has under 28 U.S.C. § 2679(d)(5).

10 November 26, 2013.

11 Respectfully submitted,

12 DANIEL G. BOGDEN
13 United States Attorney

14 /s/ Daniel D. Hollingsworth
15 DANIEL D. HOLLINGSWORTH
16 Assistant United States Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. STATEMENT OF CASE

A. Procedural History

Frances M. Weeks-Anderegg (“Weeks”) failed to file her administrative claim with the United States Air Force. Weeks filed a Complaint against Kathrynne Alexine McPherson (“McPherson”) and others in Case No. A-13-674735-C, in the District Court, Clark County, State of Nevada, alleging a tortious act occurred on January 24, 2011. Weeks has not served the United States Attorney General and the United States Attorney for the District of Nevada with copies of the Complaint and the Summons. The United States removed the case to this Court (ECF No. 1) and filed the Notice of Substitution (ECF No. 4), the Motion to Dismiss (ECF No.5), the Statement of Removal (ECF No. 6), the Motion to Stay Discover (ECF No. 7), and the Joint Status Report Concerning Removal (ECF No. 8).

This Court substituted the United States of America (“United States”) for McPherson. Order, ECF No. 9. Weeks filed an Objection to Substitution of the United States as Defendant (ECF No. 10), Opposition to the Motion to Stay Discovery (ECF No. 11), and Opposition to Motion to Dismiss (ECF No. 12). The United States filed Replies to Weeks’ Objection and Oppositions.

B. Statement of Facts

From January 20, 2011, through January 28, 2011, McPherson was serving as a volunteer member of the Civil Air Patrol, performing a mission assigned by the Secretary of the United States Air Force. “The Civil Air Patrol shall be deemed to be an instrumentality of the United States with respect to any act or omission of the Civil Air Patrol, including any member of the Civil Air Patrol, in carrying out a mission assigned by the Secretary of the Air Force.” 10 U.S.C. § 9442(b)(2) McPherson is “deemed to be an instrumentality of the United States with respect to **any act or omission** [as a] member of the Civil Air Patrol” 10 U.S.C. § 9442(b)(2) (brackets and emphasis added).

II. ARGUMENT

This case should be dismissed without prejudice because (1) the parties agree to the dismissal, (2) McPherson was on an air force assigned mission and is deemed to be under the Westfall Act of the Federal

1 Tort Claims pursuant to 10 U.S.C. § 9442(b)(2) (“The Civil Air Patrol shall be deemed to be an
 2 instrumentality of the United States with respect to any act or omission of the Civil Air Patrol, including any
 3 member of the Civil Air Patrol, in carrying out a mission assigned by the Secretary of the Air Force.”), (3)
 4 McPherson was acting within the scope of employment, (4) McPherson’s actions were within the Nevada
 5 State exceptions to the going and coming rule, and (5) Week failed to file an administrative claim.

6 Although the district court has subject matter jurisdiction from statute and case law authorizing
 7 this Court the exclusive jurisdiction to decide FTCA cases (28 U.S.C. § 1346(b)), it may not have subject
 8 matter jurisdiction because the Plaintiff failed to obtain a waiver of the United States’ sovereign
 9 immunity by failing to file an administrative claim with the United States’ agency.

10 [S]overeign immunity is not merely a defense to an action against the United States, but a
 11 jurisdictional bar [S]tatutes that create federal jurisdiction do not, in and of themselves, waive []
 12 sovereign immunity. Thus, while sovereign immunity can bar jurisdiction, a statute that purports to
 13 create jurisdiction alone does not necessarily eliminate sovereign immunity We have previously
 14 explained that [i]n an action against the United States, *in addition to* statutory authority granting
 15 subject matter jurisdiction, there must be a waiver of sovereign immunity Sovereign immunity
 16 is grounds for dismissal independent of subject matter jurisdiction. A statute may create subject
 17 matter jurisdiction yet not waive sovereign immunity.

18 *Powelson v. United States*, 150 F.3d 1103, 1104-1105 (9th Cir. 1998) (citations and quotation marks
 19 omitted; italics in the original).

20 One of the jurisdictional requirements to waive the United States’ sovereign immunity is filing
 21 the administrative claim as required by 28 U.S.C. § 2675(a).

22 An action shall not be instituted upon a claim against the United States for money damages for
 23 injury or loss of property or personal injury or death caused by the negligent or wrongful act or
 24 omission of any employee of the Government while acting within the scope of his office or
 25 employment, unless the claimant shall have first presented the claim to the appropriate Federal
 26 agency and his claim shall have been finally denied by the agency in writing and sent by certified
 or registered mail.

27 28 U.S.C. § 2675(a)

28 The parties agree to the dismissal of this case without prejudice because no administrative claim
 29 was filed as required by 28 U.S.C. § 2675(a), which is jurisdictional. *Kwai Fun Wong v. Beebe*, 732 F.3d
 30 1030, 1044 n.10 (9th Cir. 2013); *Brady v. United States*, 211 F.3d 499, 502-03 (9th Cir. 2000).

1 The requirement of an administrative claim is jurisdictional. Because the requirement is jurisdictional,
2 it must be strictly adhered to. This is particularly so since the FTCA waives sovereign immunity.
3 Any such waiver must be strictly construed in favor of the United States.

4 *Brady*, 211 F.3d at 205 (citations and quotation marks omitted) (quoting *Jerves v. United States*, 966 F.2d
5 517, 521 (9th Cir. 1992)). In other words, the district court does not have subject matter jurisdiction since
6 the United States' sovereign immunity was not waived because Weeks failed to file an administrative
7 claim before bringing the civil complaint.

8 Plaintiff ... has failed to comply with that statute's jurisdictional requirement that she file an
9 administrative claim. The district court did not err in granting Defendant's motion to dismiss.

10 *Id.* at 503.

11 This case was filed in State Court. The United States Attorney for the District of Nevada certified
12 that McPherson was acting within the scope of her employment and removed the case from State Court to
13 the United States District Court for the District of Nevada. *See* 28 U.S.C. § 2679(d)(2).

14 After the case is dismissed without prejudice, Weeks may pursue whatever rights she has under
15 28 U.S.C. § 2679(d)(5), which does not spring into existence until this case is dismissed.

16 Whenever an action or proceeding in which the United States is substituted as the party defendant
17 under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of
18 this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if--
19 (A) the claim would have been timely had it been filed on the date the underlying civil action was
20 commenced, and (B) the claim is presented to the appropriate Federal agency within 60 days after
21 dismissal of the civil action.

22 28 U.S.C. § 2679(d)(5).

23 On November 26, 2013, Robert S. Cardenas, counsel for Weeks, agreed to this unopposed motion
24 and agreed to the dismissal without prejudice.

25 **III. CONCLUSION**

26 Based on (1) the parties' agreement to the dismiss this case without prejudice, (2) the fact and law
27 that McPherson was on an air force assigned mission and is deemed to be under the Westfall Act of the
28 Federal Tort Claims pursuant to 10 U.S.C. § 9442(b)(2) ("The Civil Air Patrol shall be deemed to be an
29 instrumentality of the United States with respect to any act or omission of the Civil Air Patrol, including any

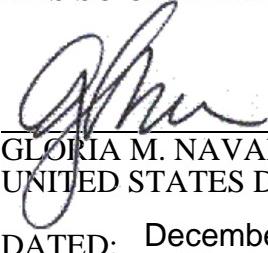
1 member of the Civil Air Patrol, in carrying out a mission assigned by the Secretary of the Air Force.”), (3)
2 the fact and law that McPherson was acting within the scope of employment, (4) the fact and law that
3 McPherson’s actions were within the Nevada State exceptions to the going and coming rule, and (5) the fact
4 and law that Week failed to file an administrative claim, this Court should dismiss the case without
5 prejudice.

6 November 26, 2013.

7 DANIEL G. BOGDEN
8 United States Attorney

9 /s/ Daniel D. Hollingsworth
10 DANIEL D. HOLLINGSWORTH
11 Assistant United States Attorney

12 IT IS SO ORDERED

13 
14 GLORIA M. NAVARRO
15 UNITED STATES DISTRICT JUDGE

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17 DATED: December 18, 2013